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FILED
185-08

No. 07-1350

IN THE

Supreme Court of the United States

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

RODALE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

DANIEL B. ALLANOFF
Counsel of Record

Meredith Cohen Greenfogel & Skirnick, P.C.
1521 Locust Street
8th Floor
Philadelphia, PA 19102
(215) 564-5182

Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141

As set forth in Petitioner's opening brief, the *Rodale* decision represents, for the first time, a formulation of the standard for determining implication of a private cause of action that does not consider a statute's right-creating language as evidence of Congress's intent to create a private remedy. No prior Supreme Court precedent supports this view, the practical result of which is to render finding sufficient evidence of intent an impossibility.

Unable to refute the Third Circuit's sharp departure from settled law and the broad significance of this holding, Respondent mischaracterizes Petitioner's argument: "[A]ccording to Petitioner, *Rodale* erroneously held that Sandoval requires a showing of congressional intent to confer both a private right and a private remedy." (Resp. Br. at 6). Thus, much of Respondent's opposition brief is devoted to responding to an argument that Petitioner never made.[1] (*See* Pet. at 8-9).

The issue here is not, as Rodale asserts, whether there must be evidence of intent to create both a private right and a private remedy, i.e. a private cause of action, but rather *what type of evidence may demonstrate such intent.* This Court has long held that individually focused, right-creating language in a statute, as in § 3009(b) here, is generally "the most accurate indicator of the propriety of a implication of a *cause of action.*" *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979) (emphasis added). *See* Pet. 6-12. As Petitioner pointed out, this Court, in *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11,

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[1] *See also*, Resp. Br. at 9 (mischaracterizing Petitioner as asserting that the analysis for a private right of action "begins and ends with a finding that a statute includes 'rights creating' language.").

18 (1979), held that this type of statutory language may itself imply intent to create a private remedy. *See* Pet. at 7-8. Further, *Rodale's* interpretation of this Court's *Sandoval* decision is plainly wrong as *Sandoval* cited *Transamerica* as authority for the very proposition being distorted here. *See* Pet. at 11.

Simply put, there is no authority to support *Rodale's* standard for determining implied private right of action that limits the significance of right-creating language in a statute to only the question of whether Congress intended to create private rights, and that gives it no weight on the question of Congress's intent to create a private remedy. Moreover, despite Respondent's attempts to downplay the importance of the decision, the significance of *Rodale's* analytical framework as a new precedent is enormous.

Petitioner submits that there is no evidence that could meet the *Rodale* standard. Indeed, indications of Congress's intent other than the explicit language it chose to use in enacting a statute will necessarily be less compelling, especially when reviewed in isolation and not as a complement to such language. For example, where legislative history might provide some evidence that Congress considered the question of private enforceability of a statute, the lack of an express right of action will be found to be evidence that Congress must have ultimately decided against a private right of action. Likewise, where the legislative history is silent on the question, opponents will argue, as Respondents do here, there must have been no intent.[2]

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[2] In the wake of the *Rodale* Opinion, at least one district court has already applied its new standard, and found against a private right

Just as the Third Circuit held that § 3009(b)'s express creation of private rights showed only that Congress intended to create private rights, the *Rodale* analysis appears to require nothing short of an express creation of a private remedy in order to sufficiently demonstrate Congress's intent to create one.

Respondent downplays *Rodale* as unremarkable and asserts that there is no split in authority on whether there is an implied right of action under §3009 because the analysis in *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 337 (9th Cir. 1977) "was undertaken in a decidedly pre-*Sandoval* world." Resp. Br. at 10-11. Respondent argues that a statement in *Kipperman* that Congress did not appear to consider the issue of intent to create a private cause of action makes the Ninth Circuit's conclusion impossible after *Sandoval*.

First, this argument fails to acknowledge that the issue is one of *implied* intent; it is not necessary that Congress "actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause

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of action without considering the statute's right creating language as evidence of Congressional intent to create a private remedy. *Byers, et al. v. Intuit, Inc., et al.*, --- F.Supp.2d ---, 2008 WL 2217684 at *22 (E.D. Pa., May 28, 2008). Petitioner does not take any position on whether the Act in question in *Byers* (the Independent Offices Appropriations Act, 31 U.S.C. §9701 *et seq.*) should be construed to provide a private right of action. What is significant however, is the fact that in making the determination, expressly relying on the *Rodale* decision, the court did not consider the statute's rights creating language in determining the question of legislative intent to create a private remedy.

of action." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

Further, recent cases undermine Respondent's claim of no split on this issue. A district court in the Ninth Circuit recently disagreed with *Rodale* and found that *Kipperman* is still good law. *UMG Recordings, Inc. v. Augusto, et. al.*, 558 F.Supp.2d 1055, 1064 (C.D. Cal., June 10, 2008). Likewise, last year the Ninth Circuit affirmed the validity of *Kipperman*. *Linder v. Reader's Digest Ass'n., Inc.*, 231 Fed.Appx. 663, 664 (9th Cir. 2007).

While the doctrine of implied private rights of action has been narrowed over the last thirty years, the *Rodale* standard does away with it altogether. To reach *Rodale's* conclusion, one must accept the illogic that Congress intended to create private rights for recipients of unsolicited merchandise, sought to insure that they not suffer financially from an unconscionable scheme, took the time and effort to enact a statute to create those rights in recipients for that purpose, and at the same time intended that such rights be ultimately meaningless as there would be no enforcement mechanism anywhere.

If there is still to be a doctrine of implied private rights of action at all, however narrowly construed, then *Rodale* must be reversed and this Petition should be granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

DANIEL B. ALLANOFF
Counsel of Record

Meredith Cohen Greenfogel & Skirnick, P.C.
1521 Locust Street
8th Floor
Philadelphia, PA 19102
(215) 564-5182

MICHAEL HENSLEY
ROBERT J. STEIN III
TUYET T. TRAN

Adorno Yoss Alvado & Smith
1 MacArthur Place
Suite 200
Santa Ana, CA 92707
(714) 852-6800

JONATHAN NACHSIN

Jonathan Nachsin, P.C.
105 West Adams Street
Suite 3000
Chicago, IL 60603
(312)-327-1777